90-1333

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1990

GAIL ELIZABETH BOBÁL,

Petitioner,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Respondents.

Petition for Writ of Certiori to the
United States Court of Appeals
for the Second Circuit

Petition for Writ of Certiorari

Gail Elizabeth Bobál
Petitioner, pro se
P.O. Box 1025
Edison, New Jersey 08818-1025
(908) 985-2043

1. Isn't the policy of academic abstention as practiced by all the federal and state courts constitutionally impermissible?
2. Doesn't academic abstention mandate a claim for breach of duty by a school in a viable academic-based suit, and isn't such a tort claim based on federal common law?
3. Isn't the policy of academic abstention federal common law which addresses rights of private and public schools, so shouldn't it as well address their liabilities, remedy their abuses of power and discretion, and protect fundamental rights of students?
4. In chartering RPI to be a body politic, didn't New York State unconstitutionally confer upon it a nature of sovereignty in power, autonomy, immunity, and privilege, and isn't the charter an ongoing state law which impairs the obligations of contracts or renders them unconstitutionally vague?
5. Aren't the acts of academic discretionary abuse committed in part under color of

state and federal law since they are engendered by a milieu of unaccountability caused by an implicit grant of immunity of the body politic charter, decisional law laissez faire of academic abstention, the treatment of academic decisions as equivalent to those of a governmental agency?

6. Do 17 USC 101,201(b) unconstitutionally cloud title to my intellectual property?

7. Didn't some defendants' actions constitute peonage or a viable variation thereof?

8. Did the appeals court violate due process by bad-dating documents, relabeling my papers as Brief and Appendix thereby leaving appellees' motion to dismiss unopposed, dismissing appeals from a R60 order denying relief and from an order which restricted injunctive relief and dismissed claims fundamental to the further conduct of my case, and refusing to investigate or remedy impeachable acts of judicial misconduct?

9. Was the appeals court biased and per-

functory, and did it sanction a departure from the norm of judicial procedure by a prejudiced judge who intentionally disregarded rules and law and abused his discretion, violated my due process rights, and manipulated my case rather than judged it?

10. Didn't it also sanction criminal conduct by the district court which deliberately altered transcript contents, falsified a court calendar, fabricated sets of stenographic notes, bad-dated a local rule, a docket sheet, and court correspondence, committed acts of mail fraud, 'held' a bogus conference, and obstructed justice?

11. Where an order is issued through fraud upon the court and criminal conduct by the court itself, isn't the order void, and isn't compliance with it a step in the furtherance of an obstruction of justice?

12. Was it due process to dismiss my case for noncompliance with an order the judge believed he had no jurisdiction to render?

TABLE OF CONTENTS

	Page
Opinions Below	1
Constitutional Provisions	1a
Statutes	1c
Rules of the U.S. District Court for the Northern District of New York for 1985	1o
Rules of the U.S. District Court for the Northern District of New York for 1986	1p
Act of Incorporation of the Rensselaer Polytechnic Institute	1w
Statement of Case	2
Argument	24
Academic abstention	24
Academic abstention as common law	25
First Amendment protection	26
Tort claim needed for viable suit	26
Unconstitutionality of academic abstention as practiced	29
Expansion of academic federal common law	36

Unconstitutionality of body-politic charter 44

Acting under color of law 46

Clouding of title by copyright laws 48

Peonage 50

Impairment of obligation of contracts 56

Dismissal of interlocutory appeals 58

Necessity of supervision by this Court 60

TABLE OF AUTHORITIES

Constitutional and Federal Laws	Page 1a
Articles	1a
Article I, Section 8	1a
Article I, Section 9	1a
Article I, Section 10	1a
Article III, Section 1	1a
Amendments	1b
Amendment I	1b
Amendment V	1b
Amendment VII	1b
Amendment IX	1b
Amendment XIII	1c
Amendment XIV, Section 1	1c
Statutes	1c
28 USC 753	1c,64
28 USC 1292(a)(1)	1e 25,58
28 USC 455	1f,63
42 USC 1994	1f,53
42 USC 1983	1g,47
42 USC 1985(3)	1h,65

42 USC 1986 11,65

17 USC 101 1j,48

17 USC 201(b) 1k,48

20 USC 1232a 11,25

15 USC 1 11,42

15 USC 2 1m,42

29 USC 50 1n,41

15 USC 45(a)(1) 1o,42

Rules of the U.S. District Court for the Northern District of New York for 1985 1o,64

Rules of the U.S. District Court for the Northern District of New York for 1986 1p,64

State Laws

Act of Incorporation of the Rensselaer Polytechnic Institute 1w,44

Cases

Citizens to Preserve Overton Park, Inc. v Volpe, 401 US 402 46

Clyatt v U.S., 197 US 207 56

Flood v Kuhn, 443 F2d 264, affd 407 US 258 55

Freeman v Chicago Musical Instrument Co., 689 F2d 715 62

Gillespie v U.S. Steel Corp., 379 US 148 29

Horowitz v Curators of Univ. of Missouri, 447 FSupp 1102, rev 542 F2d 1335, rev Bd. of Cur. of Univ. of Miss. v Horowitz, 435 US 78 25,39

In re charge of judicial misconduct, 593 F2d 879 62

Jones v Mayer, 392 US 409 55

Keyishian v Board of Regents of New York, 385 US 589 26

Morgan v Le Vallee, 526 F2d 221 54

Pollock v Williams, 322 US 4 55

Powell v Syracuse Univ., 580 F2d 1150 24

Robertson v Baldwin, 165 US 275 55

Slaughter-house Cases, 21 Led 395 51

Sniadach v Family Finance Corp., 395 US 337 41

Sweezy v New Hampshire, 354 US 234 25,26

Univ. of Calif. Regents v Bakke, 438 US 265 25,26

Werlein v New Orleans, 177 US 390 58

Opinions Below: Judgment was entered in the U.S. Court of Appeals for the Second Circuit on May 15, 1990. A petition for rehearing was granted October 22, 1990.

This case originated in the U.S. District Court for the Northern District of New York. Judgment was entered on May 11, 1987, and after a timely appeal was filed, the case was remanded for a ruling on a disqualification claim. On January 31, 1989 an order denying disqualification and reinstating the prior judgment was entered. Reconsideration was denied on March 22, 1989, and a timely appeal was taken.

On January 14, 1991 the U.S. Supreme Court granted an extension of the time in which to file a petition for a writ of certiorari, extending it to and including February 20, 1991.

The jurisdiction of this Supreme Court to review the judgment of the U.S. Court of Appeals is invoked under 28 USC 1254(1).

Constitutional Provisions:

Article I, Section 8. The Congress shall have Power

To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Article I, Section 9. No Bill of Attainder or ex post facto Law shall be passed.

No Title of Nobility shall be granted by the United States: ...

Article I, Section 10. No State shall ... pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article III, Section 1. ... The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, ...

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V. No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others

retained by the people.

Amendment XIII, Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV, Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

28 USC 753(b). Each session of the court and every other proceeding designated

by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. ...

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. ...

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official ex-

cept those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

28 USC 1292(a)(1) Interlocutory decisions. Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Is-

lands, or of the judges thereof, granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

28 USC 455(a) Disqualification of justice, judge, or magistrate. Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b)(1) He shall also disqualify himself in the following circumstances: Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

42 USC 1994 Peonage. The holding of any person to service or labor under the system known as peonage is abolished and prohibited in any Territory or State of

the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

42 USC 1983 Civil action for deprivation of rights. Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC 1985(3) Conspiracy to interfere with civil rights. Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; ...

in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 USC 1986 Action for neglect to prevent. Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for

all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; ... But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

17 USC 101 Definitions. A "work made for hire" is - (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a

work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by anoth author for the purpose of introducing, co cluding, illustrating, explaining, revis- ing, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary pictorial, or graphic work prepared for publication and within the purpose of use in systematic instructional activities.

17 USC 201(b) Ownership of copyright. Works made for hire. In the case of a wor made for hire, the employer or other per- son for whom the work was prepared is con sidered the author for the purposes of th title, and, unless the parties have ex-

pressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

20 USC 1232a Prohibition against Federal control of education. No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

15 USC 1 Trusts, etc., in restraint of trade illegal: penalty. Every contract,

combination in the form of trust or other
wise, or conspiracy, in restraint of trad
or commerce among the several States, or
with foreign nations, is declared to be
illegal. Every person who shall make any
contract or engage in any combination or
conspiracy hereby declared to be illegal
shall be deemed guilty of a felony, and,
on conviction thereof, shall be punished
by fine not exceeding one million dollars
if a corporation, or, if any other person
one hundred thousand dollars, or by im-
prisonment not exceeding three years, or
by both said punishments, in the discre-
tion of the court.

15 USC 2 Monopolizing trade a felony; penalty. Every person who shall monopoliz
or combine or conspire with any other per
son or persons, to monopolize any part of
the trade or commerce among the several
States, or with foreign nations, shall be
deemed guilty of a felony, and, on convic

tion thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

29 USC 50 Promotion of labor standards of apprenticeship. The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health,

Education, and Welfare in accordance with section 17 of Title 20. For the purposes of this chapter the term "State" shall include the District of Columbia.

15 USC 45(a)(1) Unfair methods of competition unlawful. Declaration of unlawfullness. Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Rules of the United States District Court for the Northern District of New York for 1985: Rules governing motions.

Rule 9. Service and Filing of Papers

(c) Except as otherwise ordered by the court, no motion shall be brought on for argument, unless the papers upon which the same is made have been filed with appropriate memoranda with the clerk at least ten days prior to the date fixed for argument. Anwering affidavits and opposition memoranda shall be filed five days

prior to the return date of the motion.

Rule 10. Motions

(a) All motions and hearings on exceptions and on all other contested matters shall be made returnable before the judge to whom the case has been assigned.

(b) All original motion papers shall be filed in the clerk's office located at the United States court house which houses the principle office of the district judge to whom the case is assigned.

Rules of the United States District Court for the Northern District of New York for 1986: Rules governing motions.

Rule 10. Motions

(a) All motions and hearings on exceptions and on all other contested matters shall be made returnable before the judge to whom the case has been assigned.

(b) All original motion papers shall be filed in the clerk's office located at the United States court house which houses the

principle office of the district judge to whom the matter is assigned.

(c) Upon any motion, the moving party shall file and serve with the motion papers a memorandum of law and an affidavit in support of the motion. The opposing party shall file and serve with the papers in opposition to the motion an answering memorandom of law and an affidavit. An affidavit may not contain legal arguments. Upon any motion based upon rules or statutes, the moving papers shall specify the rules or statutes upon which the motion is predicated.

(d) Every motion shall be accompanied by a form of order which, if approved by the court, will grant the relief sought by the motion. Every response in opposition to the motion shall be accompanied by a form of order which, if approved by the court, will deny or amend the relief sought by the motion.

(e) The moving party shall file with the clerk's office and serve upon the opposing party all papers and memoranda required under this Rule not later than twenty-one days (21) days prior to the date fixed for argument. Answering affidavits and opposition memoranda shall be filed and served not later than fourteen (14) days prior to the date fixed for argument. Reply papers may be filed with leave of the court upon a showing of the necessity therefor.

Note: As the intent of this Rule is to provide for the submission of all papers at least fourteen (14) days prior to the date fixed for oral argument, the Rule does not require the moving party to select the earliest possible argument date.

(f) Any party who does not intend to oppose a motion or a movant who does not intend to pursue a motion, or any party who intends to seek an adjournment of the proceedings on a motion, shall promptly no-

tify opposing counsel and the law clerk of the judge to whom the case has been assigned. Notice should be provided at the earliest practicable date but not later than seven (7) days prior to the date fixed for argument unless for good cause shown.

(g) Any papers required to be filed under this Rule that are not timely filed or otherwise not in compliance with this Rule will not be considered and may be deemed by the court as consent to the granting or denial of the motion, as the case may be.

(h) A cross-motion may be filed and served by the responding party together with the party's oppostion and may be noticed for argument the same date as the original motion. The original moving party shall file and serve a response to the cross-motion not later than seven (7) days prior to the date fixed for argument.

(i) Parties will be expected to appear for oral argument on the motion on the

date fixed for argument. The court may, in its discretion, and upon consideration of the request of the parties, dispose of a motion without oral argument, and the parties will be so notified in advance of the date fixed for argument. The parties shall be prepared to have their papers and memoranda serve as the sole method of argument on the motion.

(k)(1) Counsel have the obligation to make good faith efforts among themselves resolve or reduce all differences relating to discovery procedures and not to file unnecessary discovery motions.

(2) No motion pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure shall be filed unless:

(a) The attorney making the motion has conferred with opposing counsel and discussed the discovery issues between them in detail in a good faith effort to eliminate or reduce the area of controver-

sy, and to arrive at a mutually satisfactory resolution.

(b) In the event the consultations of counsel do not fully resolve the discovery issues, the attorney making a discovery motion shall file as part of the motion papers an affidavit certifying that the attorney has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without intervention of the court, and has been unable to reach such an agreement. The affidavit shall set forth the date or dates of the conferences, the names of the participants, and the length of time taken by the consultations.

It shall be the obligation of the attorney for the party seeking discovery to initiate such conferences and to do so promptly. In the event of a refusal to confer in good faith, resulting in the

making of a discovery motion, counsel may be subject to the sanction of the imposition of costs, including attorneys fees of opposing counsel, under Rules 37(a)(4), 30(d), (g)(1)&(2), and 26(c) of the Federal Rules of Civil Procedure.

(3) Memoranda by both sides shall be filed with the clerk pursuant to the time schedule set forth in Paragraph (e) of this Rule. Each memorandum shall contain a concise statement of the nature of the case and a specific verbatim listing of each of the items of discovery sought or opposed, and immediately following each specification shall set forth the reason why the item should be allowed or disallowed.

(l) No order to show cause to bring a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why a procedure other than notice of motion is necessary.

(m) Motions for reconsideration or reargument shall be filed and served not later than ten (10) days after the entry of the judgment, order, or decree concerned. The papers proposing and opposing the motion shall be filed pursuant to the time schedule set forth in Paragraph (e) of this Rule. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be reargued orally.

(n) The presentation to the court of vexatious motions or vexatious opposition to motions, or failure to comply with this Rule, subjects the offender to discipline as the court shall deem just, including appropriate sanctions and the imposition of costs and attorneys fees to opposing counsel.

Act of Incorporation of the Rensselaer Polytechnic Institute: AN ACT to consolidate and amend the several acts relating

to the Incorporation of the Rensselaer Institute.

Being chapter 151, Laws 1861, as amended by chapter 229, Laws 1866, chapter 277, Laws 1887, and chapter 14, Laws 1907.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The present trustees of Rensselaer Polytechnic Institute and their successors, are hereby constituted a body corporate and politic, by the name of "Rensselaer Polytechnic Institute." ...

Statement of Case: I am the petitioner and have proceeded pro se through all aspects of this case. I am a layman with no legal background or legal assistance.

I was a doctoral candidate at RPI engaged in nonfunded experimental research in Biomedical Engineering in the field of acoustic emission from bone. Although I had long since completed my courses, qualifying exam, and candidacy exam, respondents repeatedly blocked my research and my dissertation defense.

After I questioned overexpenditures on federal grant proposals I experienced increasing hostility, and attempts to remedy my difficulties resulted in retaliation. I was dealt with in bad faith, was stalled in my research, was labeled as unwanted competition by my department chairman, was exploited for my ideas and labor, and was then stopped dead in my tracks after making a major discovery which respondents

sought to monopolize within RPI. The hinrance by the faculty was intentional and malicious and was not rectified by the administration.

I was not allowed to participate in required seminars. After I submitted written ideas and my experimental rationale, my advisor denied me access to research facilities and equipment. When an assistant to the chairman refused me access to equipment I was guaranteed, the chairman explained it was because he was a Korean who couldn't deal well with women, told me to be understanding, and made me change my research topic for my thesis.

I waited half a year for the equipment he said he ordered for me, only to learn the order was cancelled. The chairman was furious I found this out, took my new written thesis proposal and assigned another student to carry it out, then bribed me to change my thesis topic again. I privately

arranged to do my experiments at General Electric, but RPI blocked the arrangement.

My advisor demanded I submit a 'fill-in-the-blanks' type thesis, telling me to fabricate data and analyze it. I was punished when I would not comply and when I lodged a grievance over the assistant's renewed refusal of access to equipment and manuals. The chairman told me not to expect the needed equipment and offered it and my research topic to another student.

I then faced disciplinary action for "unauthorized" use of a Watts line, but when I proved that Watts line access codes were issued by the chairman, he flew into a rage, threw me out as his student, cancelled my machine-shop work, confiscated personal belongings, bone specimens, and RPI-owned equipment, and locked them up in storage. The administration did nothing.

The chairman then told me that IF anyone agreed to be my advisor, I could keep

my thesis topic and use his equipment, but that he'd see to it that no one would take me. When I got new advisors, however, I couldn't get such usage because he reneged on his promise, said he didn't mean what he said, and told the administration, my advisors, and myself that he was blocking me because I was unwanted competition to him in his field of research.

My advisor readily got access to the equipment for a visiting Japanese engineer to participate in my research, but then he made me turn over the data to the engineer who immediately left with it for Japan. I didn't get it back and was left out of the papers it generated. Despite their promises, however, my advisors got such access for me alone only once! They told me instead to do my doctoral research during sales demonstrations by equipment vendors. I wasted valuable specimens and months of labor for useless data. The Department of

Energy let me to my testing at their facility, but this too was blocked by RPI.

My advisor treated me unfairly regarding his own new equipment. His doctoral student from Taiwan was allowed to use it as is so he wouldn't be delayed, but I was not. I was to find its errors, have it fixed, transport it back to RPI for the Taiwanese student, and teach him how to use it first. Later he made me stop my testing and give the equipment to an undergrad who was not to be disrupted until his tests were done. Then he took the equipment system from RPI and gave it to a private company for half a year, expecting me to teach him and them how to use it.

This advisor also disclosed my confidential information to Lawrence Livermore Laboratory, pawned it off as his own, and had threatened to prevent my doctorate if I 'went over his head.'

After they set my graduation date, my

advisors blocked my oral dissertation defense to keep my findings within that RPI community and delay public disclosure. One said he would schedule it, then reneged and threatened to automatically fail me if I scheduled it on my own. The other said my thesis was a landmark and he wanted more information and his name on papers before he would let me graduate. He told the administration not to schedule my defense.

Both advisors told me not to deal with the other members of my thesis committee until I met their demands for changes in my thesis, but the changes they sought were mutually contradictory. I couldn't satisfy them both and was denied a meeting to arrive at a consensus. Neither evaluated its scientific content, complaining instead of my writing ability, and wouldn't give me a firm set of changes which would make my thesis acceptable to them.

One said he would progressively under-

stand my thesis by making me do a long series of total rewrites as new ideas for editorialization and thesis modification occurred to him. This assured a vicious cycle, where he refused to pin himself down on changes he wanted, and where each rewrite would inevitably lead to another.

I therefore sought an impartial examiner for my thesis. After five weeks the Graduate School denied this for 'my failure' to involve the other members of my thesis committee in my work. I met with the administration; they refused to remedy or even address my grievances; they gave me no estimated date for graduation. When I said I was not satisfied with their response, they pointedly said that if I did not like it at RPI, I could leave.

Pursuant to suit, I had a seven month relationship with LAS, the Legal Aid Society of Northeastern New York, Inc. After preliminary consultations, staff attorney Michael Foster had me write a detailed ac-

count of the facts of my grievance, include all waivers, releases, and documents which could serve as evidence, and submit it for his Executive Director who was to make a decision on my representation. LAS then denied me in-house counsel, and although it said it would try to provide representation through its PAI (Private Attorney Involvement) program, it later stopped the attempt and notified me in writing that our relationship was terminated.

I then consulted with Education Law Professor Bernard Harvith. He phoned Mr. Foster who then reopened my case. Since I was now doing my own legal research, Mr. Foster had me prepare an analysis of causes of action and submit it for his supervisors with my prior write-up. Professor Harvith, who knew the previous President of LAS, told me the current President must be made aware of my case and provide help. Therefore I submitted my write-ups for the Pres-

ident of LAS on appeal of the Executive Director's decision, and Mr. Foster accepted them as such. I was later told th decision on in-house counsel was upheld, but LAS would again try to procure a private attorney. Mr. Foster acknowledged the President's involvement when I pressed him on the finality of the decision and when I addressed the Professor's belief that the prior President would have helped

Two months later LAS wrote that they found a private attorney who might take my case. Without my knowledge or consent, this attorney, Susan Weber, discussed my case with a purported agent of RPI, one she understood to be a professor working with the administration to set up a mentor program and handle students' problems. I was given their advice to return to RPI and not sue. In preparing my appeal I saw that the President of LAS at that time was Miriam Netter, respondents' counsel during

this case. This conflict of interest was concealed from me by LAS who wouldn't inform me who represented RPI when I asked.

I filed suit pro se, claiming diversity of citizenship for federal jurisdiction.

Respondents moved to dismiss for failure to state a claim, refusing to acknowledge allegations I pled and stating that "strict pleading standards of New York law" apply in federal court. Their only oral argument was that my complaint was long and not a short, plain statement.

Judge Neal McCurn entertained no oral argument for 19 of my 20 claims. He dismissed 16 claims and limited liability on another without ever mentioning them or giving any explanation as to how, if at all, they were insufficient. He did not advise me as to amendment but eagerly advised counsel to move for summary judgment.

The court mailed back to me, **unfiled**, my 1985 R59(e) reconsideration motion for

failure to notice it for oral argument. With it was sent a new 1986 local rule governing motion practice. To insure my motion would be ruled upon under the 1985 rules, I would not re-serve it, but rather included an amendment to it noticing it for oral argument. I then traveled 240 miles to the court to personally file them.

My motion also sought clarification which would help me amend my complaint. The judge refused to provide it although he knew I was just a layman and the Northern District of New York had no pro se clerk or paralegal. What the judge showed was more than a lack of concern for the needs of layman litigants. He soon made it clear that his court was corrupt.

The transcript I ordered of the hearing was intentionally altered in its content. There were discrepancies which could not be explained away by simple error of the court reporter. Not only were there

deletions from the true account with entire statements missing. There were also insertions of words, phrases, and sentences which were never said. Scripted dialogue was simply added to the true account of the oral argument. Statements were altered in a way so as to modify their meaning or the impression they would create.

I requested the court of appeals to provide me with a subpoena or some authorization to demand immediate access to the stenographic notes (as per my right under 28 USC 73(b)), but the court refused.

In the meantime the judge, knowing I contemplated an interlocutory appeal, reclassified my R59(e) FRCP motion and denied it under R60 without oral argument 70 days after entry of the underlying order so the time for appeal would not be tolled.

He ruled on my 1985 motion pursuant to the 1986 local rule and denied me my right to file an affidavit and memorandum of law

in accordance with the 1985 rules and the right to move to amend my complaint.

The new local rule 10 he applied to my case was hastily written and falsely dated. It apparently became law on January 1, 1986, but as late as January 7th it was not posted or promulgated in any way, and neither it nor any order enacting it into law was in the standing order file. Even the judge's law clerk and the chief clerk for the District were unaware of the new rule during the same month it was signed.

The court refused to strike respondents' answer even though its inadequacy was admitted to in an affirmative defense and even though it was a qualified general denial without bona fide admissions and portended abuse in the discovery process.

When my transcript from this second hearing was ready I went to confront Mr. Daniel Mayo, the court reporter. When I arrived at the courthouse he wasn't in his

office, so the court clerk said to check the judge's calendar for May 8th to see if he was listed and where he'd be next day.

When he came and produced the second transcript, I saw that too was an altered version of the true account. I presented him with a copy of 28 USC 73 and demanded to have access to his notes and xerox them. He would not comply and said he would do nothing till he talked to Judge McCurn. I told him I feared he would alter his notes as well, so he showed me both note stacks, let me copy the motion indicia on the top page, and told me they would remain intact.

The next day the judge and Ms. Netter supposedly held a conference without me, and the judge issued a discovery order to give respondents precedence in discovery and speed the demise of my case. (A21&22) The judge allowed her to serve and file an incomplete R26(f) FRCP motion seeking a discovery conference and do so on May 9th,

one day **after** the conference had already occurred! She called it a "presentation" (A61), and the court filed it as "Facts" (A62), but it was an uncompleted motion.

The court calendar for May 8th that I inspected on May 7th had no such conference listed. I maintained that the conference was bogus, and the court's docket sheet proves me correct. It (A62) shows the May 9th filing being docketed BEFORE the docketing of the May 8th conference's minute order and Mr. Mayo's transcript!

When I returned to the court a month later to xerox the May 8th calendar for proof, a new first page had been added to show a conference in my case. However, the pagination and numbering of the conferences contained prove this page was added after the fact and represents criminal tampering with court documents.

To lend credence to the bogus conference, the court committed separtate acts

of mail fraud to indicate the conference had been scheduled. Two different court personnel under Judge McCurn sent me letters scheduling the conference. Strangely they both mistyped my street name in an identical way. One was supposedly mailed on April 21st by the judge's secretary who later admitted she was out sick that day. I notified my post office to be on the lookout for this letter, and they stamped it as received on May 28th, five weeks after its postmark date. The other letter postmarked April 30th was also fraudulent.

When I was told I could now inspect the stenographic notes, the notes given me had different motion indicia on their top pages and were **not** the same note stacks Mr. mayo first produced. These notes were fabricated to comport with the transcripts.

I suffered a fraud upon the court perpetrated by the court itself. The judge lost the authority conferred on him on the

condition of good behavior, and when he scheduled another conference, I came to object rather than participate. He denie me time to acquaint myself with the vast rules governing discovery and evidence, did not let me share in formulating a mutually acceptable plan for discovery, sai I was to make myself available to respond ents even if they were unavailable to me, and retained a harsh discovery order.

I treated his pretrial order as void. I had already filed two Notices of Appeal one from the R60 order denying relief, th other from the underlying order which restricted injunctive relief sought by the complaint. He acknowledged my right to take such an interlocutory appeal, and I considered full jurisdiction to have tran ferred to the appeals court since the sub ject matter of discovery was the same as that being appealed.

I then encountered transgressions at

the appeals court. They put false filing dates on documents, one example being a document stamped received on June 9, 1986 but bearing a May 16th filing date. More importantly they crossed out the titles on my papers answering respondents' motion to dismiss, relabeling them as the Brief and Appendix, fraudulently inserted a random order as the order on appeal, and docketed them as such. In so doing, the court left the motion to dismiss my appeal unopposed.

I brought all these matters to the attention of the Second Circuit through a complaint of judicial misconduct, but they threw it out. Instead of investigating, they condemned my allegations as frivolous, unproven, and more appropriately raised on appeal. Later, they refused to deal with them on appeal either.

I contacted the FBI, and they took my charges seriously. After two meetings they took my sworn statement and presented the

matter to an Assistant U.S. Attorney for authorization to investigate Judge McCurn. However, he promptly squashed the matter, and when I tried to meet with him to discuss it, he dispatched two federal Marshals to arrest me for loitering if I refused to leave the federal building.

Judge McCurn was made aware of all of this, including the credibility of my allegations by the FBI. He ruled that all my allegations were false (A34&35), refused to recuse himself, and sat as finder of fact over his own misconduct and that of Ms. Netter with whom he colluded.

When my appeals were dismissed I moved for reconsideration on the grounds that dismissed breach of duty claims were fundamental to the further conduct of my case under the policy of academic abstention.

When respondents moved to dismiss my case for noncompliance with the scheduling order, the judge conceded his belief that

he lacked jurisdiction to take any action in the case while my motion was pending in the appeals court. He continued the motion sua sponte for half a year until he felt jurisdiction returned to his court, then he promptly dismissed my case. (A28)

Bad-dating was so commonplace at the district court that when I filed a Notice of Appeal, my copy was stamped with two different filing dates, six days apart!

Upon remand, I timely moved the court under R60(b) to vacate its judgment, but he refused to even entertain the motion. He also would not let the disqualification claim address Ms. Netter's ethical violations (such as fabrication of legal support for arguments) or her participation in a fraudulent scheme to channel me back to RPI's grievance procedures with Ms. Weber as intermediary and to discourage a suit.

The judge wanted an evidentiary hearing, entertaining no oral legal argument

on the disqualification claim. He overruled my objection that where the testimony was so clearly in conflict, disqualification was mandated as a matter of law. He again refused recusal and denied me an advisory jury. He ruled that I was a client to whom the duty of confidentiality was owed by LAS through its referred lawyers. However, he denied disqualification for want of PROOF OF RECEPTION of confidential information by Ms. Netter, and he ruled that my testimony did not constitute EVIDENCE of a conflict of interest.

At my appeal the only question asked by a circuit judge on oral argument was whether I knew my case could be dismissed as a sanction for noncompliance with the pretrial order. But instead of asking me, he only asked Ms. Netter, and she said no, choosing to answer as to my state of mind. Their ruling rested solely on this one issue, but the judges were so close-minded

as to anything I had to say that they only asked opposing counsel what knowledge I did or did not possess. They reversed the dismissal of my four claims on their perceived lack of warning of such a sanction.

In a petition for rehearing I informed them that I had been warned. Thereafter they completely affirmed the judgment of dismissal with prejudice under R37(d) FRCP.

28 USC 2403(a) and (b) may be applicable. Neither the U.S. Court of Appeals for the Second Circuit nor the U.S. District Court for the Northern District of New York has certified to either the Attorney General of the United States or the Attorney General of the State of New York that the constitutionality of any Act of Congress or Act of the Legislature of the State of New York was drawn into question.

Argument

Through its judgment affirming dismissal of my claims by the district court, the Second Circuit Court of Appeals decided federal questions of first impression which should be addressed, and many conflict with legal trends and principles of applicable decisions by this Court.

Academic abstention. This is a policy of judicial nonintervention practiced by the Supreme Court and every other federal and state court in the United States. It states that courts will not intrude on academic matters absent the presence of abuse of discretion. The Second Circuit ruled in Powell v Syracuse Univ., 580 F2d 1150, that a court must abstain from substituting its judgment for the decisions of academicians and cannot grant relief absent a clear showing that decisions were arbitrary, capricious, or in bad faith. The Supreme Court said that "there is no

warrant for judicial interference in the academic process" (Univ. of Calif. Regents v Bakke, 438 US 265, 319 n.53) and reasoned that "the judicial presence in the academic community" would "risk deterioration of many beneficial aspects of the faculty-student relationship." (Horowitz v Curators of Univ. of Missouri, 447 FSupp 1102, rev 542 F2d 1335, rev Bd. of Cur. of Univ. of Miss. v Horowitz, 435 US 78)

Academic abstention as common law. This policy is entrenched as decisional law. Not only is it common law of the State of New York, it is federal common law as well. It is rooted in public policy, where the "future of our Nation" and the "dependence of a free society on free universities ... means the exclusion of governmental intervention in the intellectual life of a university." (Sweezy v New Hampshire, 354 US 234, 250, 262) It finds expression in legislation (20 USC 1232a),

and meets the uniform national standard of adherence that makes it federal common law.

First Amendment protection. Academic abstension manifiests the courts' recognition of academic freedom as a protected right of an educational institution and its academicians; and academic freedom is a special subset of First Amendment freedoms. (Keyishian v Board of Regents of New York, 385 US 589, 603-4) The Constitutional protection extends to the **actions** of academicians as well as their thoughts (Sweezy at 262), and specifically reaches academic **judgments**. (Bakke at 312)

Tort claim needed for viable suit. In saying that there can be no judicial intervention and no granting of relief without the presence of abuse of discretion (be it caprice, arbitrariness, bad faith, ill will) in academic decisions, this Court must recognize that acts of such discretionary abuse causing damage to

a student establish, in and of themselves, a claim upon which relief can be granted. (This is dictated by the law of contra-positives in the area of logic; this says: where IF A, THEN B is true, then IF NOT B, THEN NOT A is true also.) If relief can't be granted without abuse of discretion, then abuse of discretion (plus damage) allows the granting of relief and thereby states a claim.

Such a claim is mandatory for a viable student-plaintiff suit and is an ex delicto claim of breach of duty of the school to the student. The federal common law of academic abstention forces a court to recognize a duty implied in law which it must enforce against a school if breached. The duty derives from the relationship between the academic profession and the public which has a right to rely upon the good faith, fair dealing, and reasonable care of members of that profession. It also

derives from the special relationship between the school and the particular student and far exceeds, both in concept and scope, a mere implied covenant which would exist for any cold, commercial contract.

This duty need not be precisely defined, because it is not for me alone to give this definition. Because it is implied in law, it is for a court to define. It must of course depend upon the nature of the particular student's relationship to the school and its agents, and perhaps there are several duties to be recognized and defined by the court.

Many of my claims which were dismissed adressed this duty from a different perspective or addressed distinct duties, and the district and appellate courts refused to recognize them or attach such tort liability to RPI or its agents. They tossed aside this form of claim in an act of protectionism for academia even though this

form of claim is a necessary concomitant to a viable case. I appealed the interlocutory order dismissing the claims upon this breach of duty, arguing that an immediate appeal was necessary because the matter was fundamental to the further conduct of my case. My case was dismissed because I acted in part upon the belief that my interlocutory appeal would be jurisdictionally valid under this Gillespie Rule exception to finality (Gillespie v U.S. Steel Corp., 379 US 148), and I feel the Second Circuit's refusal to recognize my claims and their own jurisdiction violates the concept of ordered liberty and decisional law of this Court. Where there is no judicial oversight of academic discretion, then tort liability must attach for cases where this discretion is abused. This is a legal imperative, and to do otherwise would be contrary to public policy.

Unconstitutionality of academic

abstention as practiced. The court accords a university quasi-judicial power, autonomy, and immunity in all things academic, regardless of whether it is public or private. In so doing it violates an immutable principle of justice: even a student must be protected from arbitrary power not acting by general laws. It is a principle of the Supreme Court that it never give constitutional immunity to a law which imposes unforeseen advantages or burdens on any contracting party; and academic abstention is federal decisional law, and it owes its 'life' to First Amendment protection.

This common law does more than give academic freedom legal recognition and the de facto status of a constitutional right; it gives license to a school's culpable actions. It causes academic discretionary power to be vested beyond review, creating a breeding ground for unaccountable behavior. It is hypocritical to create a

policy of decisional law where academic discretion can't be questioned or refuted and to do so in the name of protecting intellectual inquiry and the quest for truth. Judicial practice has turned a First Amendment freedom malignant, where a school's institutional right to academic freedom is allowed free reign to the detriment of the legal rights of others: its students.

This common law of academic abstention violates the Ninth Amendment. It uses a First Amendment protected right of academic freedom to deny or disparage my rights and those of other students, be they contract rights, property rights, etc. It denies and disparages by not allowing for weighing and balancing of one right against another, of one person's interests against those of another. It gives carte blanche, and it does so in name of enumerated First Amendment protection.

Supreme Court precedent acknowledges

the need to weigh and balance one right against another, even if only one of those rights is of constitutional dimension. For example, this Court saw the necessity to define a proper accommodation between the law of defamation and freedom of speech and the press, determining the extent of a publisher's privilege against liability for defamation against a private citizen.

A proper accommodation has to be defined as well for my rights against those of RPI, and some of those rights are fundamental. One person's constitutional right can't be conditioned on the forfeiture of the rights of another, yet that is exactly what academic abstention achieves.

My rights under the Seventh Amendment are violated by this policy. This is true whenever findings of fact on academically related issues form elements of a claim. Neither the judge nor the jury may substitute its decision for that of the academi-

cian, and a jury is not allowed to be fact-finder for all pertinent facets of a claim. Academic decisions are accorded presumptive correctness by a court who functions in a curious way as advocate of that party. This truly makes one party the judge in his own case and gives him the status of supreme, impartial, expert witness as well.

This presents an unconstitutional irrebuttable presumption: no liability can attach to an academic decision, because the decision is presumptively correct; but it is only presumed so because no court will review it. This Court has ruled that parties whose rights are to be affected are entitled to be heard; but objectivity requires no taint of a premature decision on the facts, and that is what academic abstention yields.

Academic abstention also violates Article I, Sections 9 and 10 of the Constitution. A democratic society should not

create castes whose members are given privileges and immunities unavailable to the public. The court will not substitute its judgment for that of the school because the school has superiority with respect to its decisions. In making an exception to this rule in the presence of bad faith, the court also presupposes magnanimity of character. Under color of state and federal decisional law, a privileged group has been created in academicians, with preeminence bestowed by virtue of intellect, rank, and character. By definition this makes academia an 'aristocracy,' and in actuality state and federal governments have both granted what amounts to de facto titles of nobility.

Academic abstention decisional law also violates the Fifth and Fourteenth Amendments by denying student plaintiffs due process and equal protection of the law. Even though questions on academic

decisions do not go to a jury, the court treats the school as the trial court with itself as appellate tribunal, reviewing only for the presence of discretionary abuse. Yet to presume the answer to a question of fact is unconstitutional.

Academic abstention was adopted as law because it was felt to be inequitable to a school to subject it to the court's scrutiny. So the court takes issues of fact which should comprise common law claims and either analyzes them from a constitutional perspective by according them First Amendment immunity or analyzes them as suits in equity on the ground that it would be inequitable to leave a malicious, arbitrary, or capricious act uninspected. The court does not grant a student damages if wronged in this way; it just 'does a little equity' by telling the school to 'be fair from now on.' This is a substantive violation of due process, because

full access to the courts and the opportunity to present an unfettered right of action represent a liberty and property interest. Academic abstention is a de facto governmental ratification and enforcement of a private wrong where liabilities of the school for its discretionary abuses are not addressed. Again this violates the concept of ordered liberty because the court won't let due process work for a student plaintiff and either can't or won't enforce contract obligations of a university defendant.

Expansion of academic federal common law. Since it already exists to address the rights of academicians, federal common law should be expanded to establish a more realistic assessment of their obligations to their students, depending on the nature of the particular student-school relationship, and must address the rights of particular students as well.

As a doctoral student working on non-funded experimental research approved by RPI, I claimed that I was entitled to the equipment and facilities needed to conduct my work. I was at their mercy, but they stalled me for eight long years - eight years, for God's sake! The court of appeals didn't see this as a basis for a tort claim, and they saw no fundamental right of which I was deprived. As they so aloofly ruled, my "claims raise issues that are **more properly** and fully addressed in [her] **contract** claim." However, courts may not mandate specific performance on a contract claim because they may not direct a school's discretion. Punitive damages would also be wanting; and my rights and remedies for them are **more properly** and more fully addressed in **tort.**

Since I wasn't paid for the research I did and the discoveries I made, I conferred intellectual property upon RPI and

was consigned to their good faith. I had to also work under an advisor. Still, the Second Circuit saw no claim for breach of fiduciary duty, and in fact saw no duty owed to me at all by RPI by virtue of our relationship and limitations on their constitutional right to act on their academic freedom. They ruled on an important federal question of first impression, and they ruled wrongly. It must be settled by this Supreme Court, because it impacts on many students and involves matters of important public policy.

When a student contracts with a university, he should not be relegated to the status of a legal eunuch, governed by discretionary whim of an academic aristocracy. Society puts a high economic premium on higher education, and it should place no one in a position of having to consign his time and future to the good will of a university all at his own risk. The cost is

too high for the lack of legal safeguards provided. The penalty and stigma for not being able to 'negotiate the system' is higher than for not entering the system in the first place. (See Horowitz, 435 US 78)

No school should be allowed to take my money, waste my time through false assurances, then with impunity tell me if I don't like it, I can leave. There is no rational freedom of choice, when to leave is to lose everything; and this Court says that the right of rational choice is a portion of ordered liberty. The Second Circuit did not wish to constrain or review the discretionary will of RPI, but I have a fundamental right to expect full and proper legal redress for these wrongs. My entitlements are more primal than a policy of deference to the 'nobility' of RPI, and they should not be thwarted by an unconstitutional policy that only suits the wishes of an elite academic community.

I am not asking this Court to create rights. I'm asking it to recognize them, for they surely exist. They exist in different measure for different types of academic relationships, but they must be clarified through federal common law. There must be national uniformity, because academia is one of the largest forms of interstate commerce in this country, and the student-school relationship is largely commercial, and not merely associational. Important liberty and property interests are at stake; schools should not be able to stymie these interests at will and with impunity. Students such as I consign much of our future to the discretionary acts of our universities; and this Court should define the proper accomodation between my rights and RPI's.

The Second Circuit saw this issue as purely contractual, but there are constitutional and public policy constraints

that limit freedom of contract and contract remedies. This is a relatively recent development in contract law that began with Sniadach v Family Finance Corp., 395 US 337. For a student like myself, contract terms in a catalog and handbook are too vague to define the accomodation between the rights of the parties. They are unconstitutionally vague, and they are contracts of adhesion. All universities are the same this way, so this Court must provide the definition through decisional law.

There are other reasons for the provision of such law. My status as a research graduate student was basically that of an apprentice. Legislation exists for the promotion of labor standards of apprenticeship (29 USC 50), and the Court should extend this public policy to provide some protection and recompense for me.

The court of appeals saw my claim of antitrust violations and unfair competi-

tion as frivolous. In actuality the court refused application of laws such as 15 USC 1,2,&45(a)(1) to the academic community. Education, however, is big business, and the activities of 'academic trade' (semiars, publication of research, etc.) form the free flow of information and technology which is a large part of the interstate commerce of the profession.

Respondents conspired to restrain this commerce and engaged in unfair competition with me. They acted to foreclose dissemination of my intellectual property and suppress my discoveries in order to monopolize the academic trade in my area of research. They stalled me till they could 'corner the market' in this area of expertise free from competition before disclosure through thesis publication and oral defense. They conditioned graduation upon conferral of intellectual property rights and combined with other institutions and with University

Microfilms to achieve this end and deny copyright protection to a student's work.

By affirming the dismissal, the Second Circuit decided a question of first impression which this Court should address.

It should be apparent why principles of public policy (some expressed in legislation) should be brought to bear on my case. This Supreme Court has already made federal decisional law for academia, and it must expand it to achieve a better balance of the rights it perceives for the school and the student. Surely there is no balance now, and the affirmance of the R12(b)(6) dismissal by the court has licensed abuse by the respondents and ruled it unremediable.

Because education is indeed interstate commerce, and citizens of one state matriculate in institutions of another, there is a need for uniformity in such decisional law. Because academic freedom is protected

by the First Amendment, the federal government has a strong interest in defining the extent of this right and setting its limits (to show where liability would attach) which in turn implicates the duties of federal courts to rule upon it. To allow various state laws to advance and fine-tune the duties of a school would have a strong adverse effect on federal policy; there would be uncertainty in students's rights and different treatment of litigants for similar claims. However, the advancement of federal common law on this issue would not have an adverse impact on state interests, and it should be undertaken by this Court to loosen abstention.

Unconstitutionality of body-politic charter. The State of New York has enacted law which charters RPI to be a body politic and not simply a corporation. This gives RPI a quality of sovereignty and gives it the unconstitutional status of being a

state-within-a-state. This state action makes RPI a 'micro-state' where the laws of general society don't apply, where its academic discretionary power is immune from scrutiny, and where abuse of this power is immune from retribution. The state gives RPI power that it does not possess as a natural right of corporate autonomy, granting it what is traditionally beyond the scope of private authority. This charter does not define the nature or extent of the privileges bestowed; it grants undisclosed liberties and exemption from constraint. It is unconstitutionally vague and too ambiguous to be an act of legislative police power. This state law is unconstitutional in a manner similar to the common law of academic abstention. Here, however, it sets down in writing the entrenchment of RPI's academic immunity, and gives it carte blanche. In so doing New York has violated the Fourteenth Amendment.

Acting under color of law. Through the law of academic abstention and the body-politic charter, the state and federal government make RPI the sole arbiter of its own acts. They treat academic discretion as if it were the delegated decision-making of a governmental agency, and their courts review it only through the eyes of equity. It is agency actions which are reviewed only for abuse of discretion; it is agency actions which are entitled to a presumption of regularity, whereby a court is not empowered to substitute its judgment for that of the agency. (Citizens to Preserve Overton Park, Inc. v Volpe, 401 US 402, 415)

Indeed, governments delegate most of their function of certification to schools, accepting diplomas as certificates of qualification. The state uses a diploma as part of its own certification for licensure because a school is given the power to cer-

tify competence, and it serves this function for the state. Justice Rehnquist admits that state action exists when actions are taken under power delegated by the state and that power is traditionally associated with sovereignty.

Where the respondents knowingly acted without regard to their proper discretion, they did more than simply abuse this discretion. They acted upon NAKED POWER bestowed upon RPI and its agents by state law. The State of New York chartered this carte blanche and maintained freedom from liability for academic actions. New York fostered a state of unaccountability for the respondents by giving them the POWER to freely exceed their lawful authority. In so acting, respondents abused their power more than their discretion: and in so doing, they acted under color of state law.

I claimed a civil rights violation under 42 USC 1983. The court saw no state

action in these points I raised. This is an issue of first impression for the Court.

Clouding of title by copyright laws. The results of my research and the fruit of my intellectual labor are the "answer material to a test" of my competence and qualification to receive a doctorate. RPI stipulates that intellectual property independently published by a student may not be not be considered for inclusion in the thesis and makes it binding on the student in writing. This "answer material for a test" is declared to be a "work made for hire" by 17 USC 101, and 17 US 201(b) confers ownership of copyright to this intellectual property to the "person for whom the work was prepared." This person is declared by this statute to be the author. This person need not be an employer. For a graduate student like myself this would be the corporate institute.

This clouds the title to my intellec-

tual property which may be considered to be owned by the respondents even though my research was nonfunded and my discoveries were made solely on my own without their input or direction. Simply having the right to supervise my research and editorialize my thesis may be sufficient.

Academia has written themselves into the federal copyright laws which encompass intellectual property and serve to assign it to the school. It does this to facilitate the disclosure of information to the public through unhampered publication.

As the American Association of University Professors says, "Institutions of higher learning are conducted for the common good" which "depends upon the free search for truth and its free exposition." To this end, there must be "full freedom in research and in the publication of the results." And this cannot be if the copyright vests in the student.

This is a governmental taking of private property with the ultimate purpose to benefit the public and is accomplished without just compensation. As stated by Justice O'Connor, as long as the purpose of the taking is public, the taking is not condemned just because property is transferred in the first instance to the private sector. However, the "work made for hire" doctrine of the copyright laws does violate the Fifth Amendment when applied to someone like me. Here there was not just compensation. I was not paid for my efforts, and I received no degree.

Peonage. The district and appellate courts refused to recognize a claim for peonage or a cognizable variation of it as an extension or modification of existing law. The refusal to recognize a profound violation of what should be a fundamental right was a decision on an important federal question which should be settled by

this Court.

Working on an experimental thesis is not an education per se; it is really an apprenticeship. Knowledge is free for the taking, available to anyone willing to open a book. What I and others like me sought is a formal certification: the degree, a sanctioned stamp of approval labeling me as qualified in my field. The grad student is an apprentice, but when the work is unduly onerous and unceasing, this apprenticeship becomes a peonage. The Supreme Court recognized involuntary servitude in long term apprenticeships and saw servitude and slavery in such a curtailing of a right in the pursuit of property. (Slaughter-house cases, 21 Led 395, 406)

Contrary to the public policy expressed in Article I, Section 8 of the Constitution the respondents may own my intellectual property, and they surely control my interest in it, since I can only reap its

value by its inclusion in an approved thesis. They held my liberty and property interests in bondage to their will and are empowered by the judiciary and the state of New York to do so. Emboldened by the deference accorded their discretion, they felt free to hold me to a long term apprenticeship whose terms and duration were determined solely by them.

I had to confer intellectual property without a guarantee of a degree for compensation. The compensation for my efforts was bounded and defined. I would either receive the degree in total, or I would receive no compensation at all. However, the obligation I had to meet to reap the benefits of my labor was neither bounded nor defined. It was subject to respondents' unfixed and ever-changing discretion, a discretion which no court will direct.

The efforts to liquidate my obligation became a limitless task because they would

not pin themselves down on its extent. They kept changing my obligation, continually demanding more of me, then acting as if they were not satisfied. Since I could profit from my intellectual property only by 'working off my debt', unjustly enriching respondents, a servitude attached to it and to me. The more I labored, the more property I conferred; the more property I conferred, the greater became the value of my interest in it. Instead of providing a relatively fixed obligation in return for a fixed contract benefit, they made me work off an ever-increasing debt subject to their whim. I was compelled to academic servitude to work off a bailment of my own property. They bled me of my ideas, took my property, exploited me as cheap labor, and wouldn't set me free; but the choice to call it quits without the compensation of a degree was no choice at all.

This was peonage under 42 USC 1994 or

a cognizable variation of it, but the Second Circuit didn't see it that way. Only when labor is justly compensated and not excessive, is there no servitude attached. (Morgan v Le Vallee, 526 F2d 221) At the very least the appeals court should have recognized the violation of a right so fundamental as to be constitutionally protected (perhaps through the Ninth Amendment) or remediable through common law.

The court knew I was not physically or legally coerced to remain at RPI and continue on my doctorate, but it also knew I could not escape the obligation to go on, since there was no substitute for the consideration toward which I was working and no other 'master' from which this consideration could be obtained.

I did not labor to work off a debt of monetary consideration, but one consisting of liberty and property interests which had no substitute. I could not obtain the

'currency' of this consideration elsewhere or in any other way. This Court ruled in Pollock v Williams, 322 US 4, and Flood v Kuhn, 443 F2d 264, affd 407 US 258, that a claim can't be sustained under the Thirteenth Amendment unless the plaintiff has no option to work elsewhere. Therefore, a claim could be stated if there is no such option, and for me there was none.

This Court recognized that a burden on the rights of property constitutes an incident of slavery (Jones v Mayer, 392 US 409), and ruled that there is an undeniable right under the Constitution and the Thirteenth Amendment to acquire, possess, and protect property. (Robertson v Baldwin, 165 US 275) It said that private conduct may be made civilly remediable and that this type of conduct may extend beyond the actual imposition of slavery or involuntary servitude. In ruling against me on this federal question of first impression, the

Second Circuit ruled contrary to applicable decisions of this Supreme Court which said, "Slavery implies ... at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own ... property and services." (Clyatt v U.S., 197 US 207)

Impairment of obligation of contracts. RPI's body-politic charter is state legislation granting it autonomy, power, immunity, and privilege in the nature of that possessed only by a sovereign entity and barring the substitution of its discretion by that of a court. As already argued, this means my obligation under contract may be endless because it is a function of sacrosanct, subjective discretion. This concept, however, lies outside the boundary of lawful contract theory: one can't contract for an unknown, purposely vague obligation. How would it be enforced in a

court of law? Equally vague are the obligations of respondents to me. The charter impairs the obligation of contracts, and whether an ongoing state law such as this can be considered to do so unconstitutionally is a federal question of first impression to be settled by this Court.

Article I, Section 10 of the Constitution does not specify that the passage of such a law must come after a contract, and although this is decisional law, there are grounds for an exception in this case. Here the state law contains a vague term (chartering as body politic) whose meaning, and all rights attendant upon it, are subject to the interpretation of the one contracting party privileged by the power conferred by that term in the law. This party is enabled to determine its own duties unthis law, and therefore its own obligations to a student party to the contract. Here the rights and duties of this ongoing state

law may change to suit the school even after it has contracted with the student. I claim this is unconstitutional. Through its judgment of affirmance the Second Circuit decided this federal question.

Dismissal of interlocutory appeals. As I already argued, the Second Circuit decided an important federal question of first impression by determining that dismissal of claims for breach of duty was not fundamental to the further conduct of my case. The court also did not accept jurisdiction under 28 USC 1291(a)(1) even though an order on appeal had the effect of limiting the scope of the injunctive relief I sought through my complaint. It did so by dismissing claims directly addressing such injunctive relief, claims inextricably related to same, and claims expressly requesting removal of clouds. In Werlein v New Orleans, 177 US 390, the Supreme Court ruled that removal of cloud

cases are ones in which injunctive and declaratory relief merge into one. The decision of the appeals court conflicted with applicable decisions of this Court, and my case was dismissed for my stand on the transfer of jurisdiction on the appeal.

The district judge conceded his belief that jurisdiction had transferred to the appeals court and that he had **no jurisdiction** to take any action in my case because I filed a motion for reconsideration of the dismissal of my appeals. I would not comply with an order rendered after Notices of Appeal had been filed, yet the judge dismissed my case for noncompliance with it, when all I did was act upon the same belief in lack of jurisdiction which he obviously held. To sanction me for this shared belief was bad faith; he was willing to 'usurp' power he didn't believe he had. This was bad behavior which stripped the judge of his authority under Article III,

Section 1 and was a violation of due process. The Second Circuit affirmed the dismissal and decided a novel federal question to be settled by this Court.

Necessity of supervision by this Court. The Second Circuit Court of Appeals had departed from the acceptable and usual course of judicial procedure. It showed prejudice on my appeal, questioning opposing counsel alone as to my knowledge and state of mind on a matter upon which their decision rested. It's collective mind was closed to anything I had to say, and it evidenced a prejudgment as to my honesty and therefore the validity of my arguments. It ignored what I wrote, for even after I addressed the issue of my ability to refile some claims if dismissal had been without prejudice, they ruled I "never voiced any belief that the dismissal warning meant anything other than dismissal with prejudice." It shows their mind set.

On my disqualification claim the district judge ruled that my testimony didn't constitute evidence! In affirming the denial of disqualification, the Second Circuit wrote, "**no evidence whatsoever** has been advanced to suggest even a potential conflict." My written and oral testimony provided this evidence: I testified that Mr. Foster acknowledged counsel's involvement in the decision concerning my representation by LAS and that he did so upon questioning by me. The appeals court did not weigh such evidence, it simply ruled there wasn't any. This Court must address the matter, not to review issues of fact or to judge sufficiency of evidence, but to recognize that this decision was a denial of due process. The court put itself in conflict with the Seventh Circuit (and others) where all doubts must be resolved in favor of disqualification, evidence must not be in conflict, and uncontroverted

affidavits are needed to rebut the presumption of shared confidences. (Freeman v Chicago Musical Instrument Co., 689 F2d 715)

There was denial of due process in the court of appeals' bad-dating of documents. It may seem minor, but it shows the court's willingness to compromise its integrity, and due process of law demands access to an honest, impartial court, and I didn't get it. To relabel answering papers, insert a random order, and make a dismissal motion appear unopposed was no clerical error; it was a venal attempt to undermine an appeal, and it violated due process.

So too did the refusal to investigate allegations in my complaint of judicial misconduct. It is againsst public policy, federal statutory and decisional law, and the Second Circuit's own local rules for Judge Wilfred Feinberg to have demanded PROOF of such criminal conduct. One of his own citations, In re charge of judi-

cial misconduct, 593 F2d 879, 881, speaks to the sufficiency of "**any suggestion** of corruption or other impropriety or **any indication** of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office" to defeat dismissal of such complaint. The judicial council abnegated its responsibility to address acts of the judge's staff as well since this was specifically addressed by a Report of the Judicial Conference to the House Committee on the Judiciary which I quoted. The court of appeals left me subject to criminal abuse which it refused to inspect or remedy. It provided me no way out of the dilemma and left me trapped by a corrupt legal process of which it was a part.

Judge McCurn refused to recuse himself under 28 USC 455 upon my charges and his prior knowledge of them. Case law forced him to accept my allegations as true (and indeed they are!) and to judge from the

perspective of a reasonable man (such as the FBI agent who sought an investigation), but he refused to apply the law and acted as judge in his own case.

Transcipt deletions reflected his bias against pro se's and academic lawsuits. My attempt to expose this was blocked by refusing my rights under 28 USC 73 and fabricating reporter's notes. I had personal knowledge of this, and no court can say it isn't so. The same goes for altering a court calendar, mail fraud, and bad-dating an unpromulgated amendment to a local rule.

He unethically manipulated my case by reclassifying a R59(e) motion and unconstitutionally (under Article I, Section 9) applying to it this rule whose strictures I could not retroactively meet and which denied me the further reconsideration necessary to move to amend my complaint. He had dismissed claims without explanation or oral argument upon them and allowed for

no cure of their insufficiencies. He threw out novel claims, sex discrimination, and an action for neglect to prevent it. He violated the principles by which the rules of pleading and discovery interact to properly advance the course of litigation, violated the spirit and purpose of discovery, and didn't hold the scales of justice even. After having granted respondents a continuance, he denied me necessary time to prepare for discovery while prosecuting my case through two motions and two appeals.

I knew his court was corrupt and felt that compliance with his order (whose issuance resulted from fraud upon the court by the judge) would be tantamount to a step in the furtherance of an obstruction of justice. I was legally unable to comply.

The Second Circuit Court of Appeals has sanctioned a profound departure from the usual and accepted course of judicial proceedings. It begs this Court's review.

EDITOR'S NOTE:

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90-1333

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1990

GAIL ELIZABETH BOBÁL,

Petitioner,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Respondents.

Petition for Writ of Certiori to the
United States Court of Appeals
for the Second Circuit

Appendix to Petition

Gail Elizabeth Bobál
Petitioner, pro se

P.O. Box 1025
Edison, New Jersey 08818-1025
(908) 985-2043

SUPREME COURT OF THE UNITED STATES

October Term, 1990

GAIL ELIZABETH BOBAL,

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-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

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Appendix to Petition

Gail Elizabeth Bobal
Petitioner, pro se

P.O. Box 1025
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 852—August Term, 1989

(Argued February 28, 1990 Decided May 15, 1990)

Docket No. 89-7413

GAIL ELIZABETH BOBAL,

Plaintiff-Appellant,

—v.—

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants-Appellees.

Before:

OAKES, *Chief Judge,*
FEINBERG and WALKER, *Circuit Judges.*

Appeal from orders entered in the United States District Court for the Northern District of New York, Neal P. McCurn, *Chief Judge*, dismissing majority of *pro se* plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)6, dismissing remainder of case as a sanction pursuant to Fed. R. Civ. P. 16(f), 37(d) and 41(b), and denying motion to disqualify defendants' counsel.

Affirmed in part, reversed and remanded in part.

GAIL ELIZABETH BOBAL, Edison, New Jersey, *Plaintiff-Appellant, pro se.*

MIRIAM M. NETTER, Troy, New York (Pattison, Sampson, Ginsberg & Griffin, P.C., Troy, New York, of counsel), *for Defendants-Appellees.*

WALKER, *Circuit Judge*:

Plaintiff *pro se* Gail Elizabeth Bobal appeals from two dismissal orders and various other denials of relief entered against her by the District Court for the Northern District of New York (Neal P. McCurn, C. J.). Bobal advances three distinct arguments. First, she asserts that the district court erred when, pursuant to Fed. R. Civ. P. 12(b)(6), it dismissed with prejudice sixteen of her twenty causes of action and limited the relief available in one of the remaining four. Second, she argues that the district court abused its discretion when it dismissed with prejudice the remaining four causes of

action as a result of plaintiff's violation of a discovery order, and then improperly refused to grant her relief from its final judgment pursuant to Fed. R. Civ. P. 60(b). Third, she argues that the court below abused its discretion by refusing to disqualify defendants' counsel.

We find no error in the district court's denial of Bobal's disqualification motion and its dismissal of the majority of her causes of action. Nonetheless we conclude that the district court abused its discretion by dismissing with prejudice the remainder of Bobal's suit without first warning this *pro se* plaintiff that such a harsh sanction was in the offing.

BACKGROUND

The complaint in this action revolves around plaintiff's attempts to obtain a graduate degree in biomedical engineering from defendant Rensselaer Polytechnic Institute ("RPI"). She charges the school and members of its past and current faculty with, *inter alia*,

> delaying, obstructing, and preventing her from obtaining her doctorate. [The suit's] nature can be described as a breach of duty to deal reasonably, fairly, and in good faith . . . [with a student who] imparted her nonfunded scientific findings to the school. This case involves wrongful encumbrance of the student's intellectual property . . . and a bad-faith breach of contract through malicious [sex] discrimination.

Just as she perceived conspiracies against her while a student at RPI—as her Amended Complaint makes clear—so too does plaintiff now see conspiracies within

the court system designed to thwart her claims. She charges Judge McCurn with "impeachable offenses" and alleges that a recently adopted local rule for the Northern District of New York "was hastily written and enacted to prejudice her interests." She also bases her motion to disqualify defendants' counsel on an alleged conspiracy between opposing counsel and attorneys for the Legal Aid Society ("Legal Aid") with whom she once consulted, but who declined to represent her.

On December 20, 1985, after oral argument and in an opinion delivered from the bench and later memorialized in a two-page order, the district court dismissed sixteen of the twenty causes of action pleaded, and limited recovery under one of the remaining four. On May 14, 1987 Judge McCurn dismissed with prejudice the remainder of plaintiff's suit as a sanction for plaintiff's deliberate violation of a court order. His dismissal must be placed in its proper context.

On May 8, 1986, Judge McCurn held a status conference; Bobal did not appear because, she later said, she had never received the clerk's letter notifying her of the conference. The court then rescheduled the conference for June 4, 1986. At that conference, the district court attempted to fashion a discovery schedule for the action. He ordered Bobal to appear for her deposition on July 14 and 15, 1986. She stated that "I will not be available . . . This is an improper conference and I am not a party to this conference." She then left the courtroom. Judge McCurn memorialized his discovery order on June 20, 1986. Bobal forthrightly admits that she violated the court order, but attempts to justify her conduct because she "conclude[d] that the order would irreparably prejudice her case."

Neither at the June 4 conference nor in the June 20 order did Judge McCurn indicate that Bobal's failure to comply with his order would result in the dismissal of her case. On September 4, 1986, by which time plaintiff had failed to contact defendants' counsel to attempt to reschedule her deposition, defendants moved to dismiss the case, pursuant to Fed. R. Civ. P. 16(f), 37(d) and 41(b). Judge McCurn granted the motion on May 14, 1987, and on July 6, 1987 denied Bobal's request to amend both his December 1985 order dismissing the majority of her claims and his May 1987 order dismissing the remainder.

On May 14, 1988, Bobal moved—presumably pursuant to Fed. R. Civ. P. 60 and the applicable ethical canons—to disqualify defendants' counsel, Miriam Netter, on the basis of Netter's past position as president of the Northeastern New York branch of Legal Aid, which Bobal had once contacted in an attempt to retain counsel to bring an action against RPI. The district court conducted a hearing on October 3, 1988. On January 28, 1989, the district court denied the motion and denied Bobal's request for reconsideration on June 17, 1989. This appeal followed.

DISCUSSION

In more than eighty pages of appellate briefs, and with the organization and presentation of a six-hundred page appendix, Bobal proves herself capable of considerable legal research. Bobal's Amended Complaint, however, is not always clear, and its occasional confusion highlights the weakness of the majority of the dismissed claims. In examining Bobal's submissions, we are guided by the Supreme Court's mandate that *pro se*

papers be held "to less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner*, 404 U.S. 519, 520 (1972), as well as our own instructions that "a *pro se* litigant should be afforded every reasonable opportunity to demonstrate that he [or she] has a valid claim." *Satchell v. Dilworth*, 745 F.2d 781, 785 (2d Cir. 1984).

We must determine whether, given her *pro se* status and the potentially colorable nature of at least some of the dismissed claims, Bobal should have received what all parties agree was a harsh sanction. At the outset, we emphasize that appellant's charges of judicial misconduct remain conclusory and frivolous, and lack any support in the record. In fact, the record reveals that Judge McCurn displayed considerable patience with Bobal even as she displayed little with him—such as turning her back on the judge and walking out of his courtroom in the middle of a conference. Were Judge McCurn biased against the appellant, one might have expected him to grant defendants' original motion to dismiss the action in its entirety. Instead he carefully considered the motion and took pains to preserve four causes of action for further development. Those four claims include: misrepresentation; conversion; breach of contract; and interference with contractual relations, which was correctly limited—over plaintiff's objections—to acts of faculty members acting outside the scope of their employment.

We have examined the remaining claims in Bobal's Amended Complaint and substantially agree with the district court's conclusions. Several claims dismissed by the district court are not recognized in New York. Appellant cites no relevant authority—nor could we find

any—to support her claims for the substantive torts of "abuse of discretion," "intimidation," "conspiracy" or "peonage." Other dismissed claims merely repeat and reallege wrongs properly subsumed within those claims the district court left intact in its December 1985 ruling. Plaintiff's "breach of promise," "abuse of power," "malfeasance," "trust and fiduciary duty" and particularly garbled "quasi contract liabilities" claims raise issues that are most properly and fully addressed in her breach of contract claim. Her "antitrust violations" claim is frivolous, and merely realleges the contentions raised in her contract and conversion claims.

Still other claims, even when read in the light most favorable to plaintiff, fail as a matter of law. Her claim of prima facie tort fails because she did not, and apparently could not in good faith, allege that the defendants were motivated solely by malicious motives. *See, e.g., Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 333, 464 N.Y.S.2d 712, 721 (1983). She alleges the tort of waste, yet that tort requires an injury to real property, which could not be alleged in this case, as plaintiff candidly admits; she instead envisions an extension of present law from real to personal property. Her "interference with prospective advantage" claim fails to plead the essential elements of the tort. *See, e.g., Williamson, Picket, Gross, Inc. v. 400 Park Avenue Co.*, 63 A.D.2d 880, 405 N.Y.S.2d 709 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 769, 417 N.Y.S.2d 460 (1979); *Rosenberg v. Del-Mar Division*, 56 A.D.2d 576, 391 N.Y.S.2d 452 (2d Dep't 1977). Her claims for "defamation and malicious injurious falsehood or disparagement" charge, in effect, slander, yet she fails to plead adequately the actual words spoken, publication or special damages. *See, e.g., Goldberg v. Sitomer, Sitomer & Porges*, 97

A.D.2d 114, 469 N.Y.S.2d 81 (1st Dep't 1983), *aff'd*, 63 N.Y.2d 831, 482 N.Y.S.2d 268, *cert. denied*, 470 U.S. 1028 (1985).

Finally, her civil rights claim cannot withstand scrutiny as pleaded. Apparently, she attempted to charge a violation of 42 U.S.C. § 1983, but cannot properly allege that any of the defendants acted "under color of state law." It remains clear, however, that Bobal has charged sex discrimination: "Faculty defendants agreed to and did conspire together for the purpose of depriving me of my civil rights of equal protection and equal privileges and immunities under the law and acted in their individual capacities . . . [and were] motivated by discriminatory animus against me due to my female gender." It is possible to imagine a potentially colorable claim brought pursuant to Title IX of the Education Amendments of 1972, which forbids sex discrimination in federally funded education programs. 20 U.S.C. §§ 1681-1686. While we of course do not reach the merits of such a claim, and indeed cannot determine from the record before us whether such a claim can be advanced in good faith, we have previously explained that a *pro se* plaintiff who brings a civil rights action "should be 'fairly freely' afforded an opportunity to amend [her] complaint, even if [she] makes the request after the court has entered judgment dismissing [her] original complaint." *Satchell v. Dilworth*, 745 F.2d at 785 (citation omitted). Accordingly, the district court erred by refusing to afford Bobal an opportunity to replead this single cause of action.

The district court dismissed the remainder of Bobal's action as a sanction for her failure to appear at her own deposition. The court based its dismissal of Bobal's

actions on Fed. R. Civ. P. 16(f), 37(d) and 41(b). We review the dismissal only under Rule 37(d), which addresses a party's failure to appear for her deposition and thus specifically applies to the present case. There is no need to reach either Rule 16(f) or Rule 41(b). *See Salahuddin v. Harris*, 782 F.2d 1127, 1133-34 (2d Cir. 1986) (" 'Rule 37 . . . addresses itself with particularity to the consequences of a failure to make discovery . . . . There is no need to resort to Rule 41(b), which appears in that part of the Rules concerned with *trials* and which lacks such specific references to discovery.' ") (quoting *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 207 (1958)).

The imposition of sanctions under Rule 37 "is within the discretion of the district court and a decision to dismiss an action for failure to comply with discovery orders will only be reversed if the decision constitutes an abuse of that discretion." *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 845 F.2d 1172, 1176 (2d Cir. 1988). *See also Sieck v. Russo*, 869 F.2d 131, 134 (2d Cir. 1989) ("We . . . prefer to . . . provide the teeth to enforce discovery orders by leaving it to the district court to determine which sanction from among the available range is appropriate.").

However, dismissal with prejudice is a harsh remedy to be used only in extreme situations, *Theilmann v. Rutland Hospital, Inc.*, 455 F.2d 853, 855 (2d Cir. 1972), and then only when a court finds "willfulness, bad faith, or any fault" on the part of the prospective deponent. *See Salahuddin v. Harris*, 782 F.2d at 1132 (citation omitted). In *Sieck* we specifically noted that the district court order "included the warning that a default

judgment in the full amount sought by plaintiff could be entered against any defendant who did not appear [for the scheduled deposition]." 869 F.2d at 133. In *Schenck v. Bear, Stearns & Co.*, 583 F.2d 58, 59 (2d Cir. 1978), this court reversed a district court's dismissal for failure to prosecute, noting that "there had been no . . . judicial participation indicating that a dismissal might be in the offing." *See also Jones v. Niagara Frontier Transportation Authority*, 836 F.2d 731, 734 (2d Cir. 1987) ("The Magistrate advised Jones that he was obligated to answer all questions . . . [and] warned Jones that defendants might move for sanctions, 'because of what [he] construe[d] to be [Jones'] deliberate attempts to delay and frustrate the discovery in this case.' "), *cert. denied*, ___ U.S. ___, 109 S. Ct. 74 (1988).

As counsel for appellee forthrightly admitted at argument, Judge McCurn never gave appellant any such warning. It remains unclear why the first sanction in this case was the harshest sanction available. This is not to suggest that any district court would be unreasonable if it expressed some frustration with appellant's occasionally dilatory and disrespectful conduct. Nor is it meant to excuse such conduct. Yet *pro se* litigants are not generally familiar with the procedures and practices of the courts. While they have no right to ignore or violate court orders, they must nonetheless be made aware of the possibile consequences of their actions. Under the circumstances of the present case, we conclude that before the district court could impose the harsh sanction of dismissal against this *pro se* litigant, it should have informed her that violation of a court order would result in a dismissal of her case with prejudice. We thus remand to the district court the four claims left intact in

that court's original decision dismissing the majority of appellant's claims.[1]

Finally, Bobal's contention that appellee's counsel must be disqualified lacks merit. A failure to disqualify counsel will be overturned only upon a showing that the district court abused its discretion. *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975). As we have previously explained,

> [D]isqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code . . . undermines the court's confidence in the vigor of the attorney's representation of his client, . . . or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation . . . .

Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (citations and footnotes omitted).

Netter, counsel for defendants, served as the volunteer President of the Board of Directors of a Legal Aid branch office. At one point in this lengthy litigation, during which Bobal allegedly contacted more than seventy attorneys in an attempt to obtain legal representation, she contacted a Legal Aid staff attorney as well. At the hearing before the district court, Netter testified that she was never a staff attorney, never learned of Bobal's contact with the staff attorney, and had no opportunity to share whatever information that lawyer

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1 Given the disposition of the present appeal, we need not address the district court's denial of relief from its final dismissal order pursuant to Fed. R. Civ. P. 60(b).

might have obtained. She explained that her only contact with clients occurred when they requested Legal Aid to take further action *after* it had already accepted the client's case in the first instance. Significantly, Bobal's case was never accepted by Legal Aid.

Netter's testimony was supported by the live testimony of Michael Foster, the Legal Aid staff attorney involved, and by the affidavit testimony of Denison Ray, the Legal Aid Executive Director, who outlined Netter's limited role at the organization. Judge McCurn clearly credited their testimony, determined that there was not even the potential for conflict, and denied Bobal's motion. In reaching this conclusion, Judge McCurn did not abuse his discretion. Appellant asks us to find a conflict of interest whenever a potential litigant consults a legal services staff attorney about a complaint against a possible defendant who is represented by a legal services Board member. We decline to adopt that holding, especially where, as here, the legal services agency refuses to accept the case and no evidence whatsoever has been advanced to suggest even a potential conflict.

CONCLUSION

The district court's denial of Bobal's disqualification motion and its dismissal of the majority of her claims are affirmed. The four claims dismissed as a sanction are remanded to the district court, and appellant is to be afforded an opportunity to replead a fifth claim alleging sexual discrimination. We also take this opportunity to advise appellant, as well as all *pro se* litigants, that court orders—even those they think unwise—must be honored, and may be challenged on appeal in due course.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Entered: December 20, 1985

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

ORDER

Upon reading and filing the motion of Defendants dated October 9, 1985 requesting dismissal of the action herein on the grounds that plaintiff has failed to state a claim against any Defendant upon which relief may be granted, and in the alternative, if any claim is not dismissed, to

dismiss the entire Complaint as to all parties except Defendant Rensselaer Polytechnic Institute, on the grounds that (a) Rensselaer Polytechnic Institute and the Board of Trustees would have identical liability to the Plaintiff, and (b) all of the individually named Defendants acted in the course of their employment; the Memorandum of Law and the Reply Affidavit of Miriam M. Netter, Esq., sworn to November 14, 1985 in support of the motion, and the Memorandum of Law, Responsive Paper of Gail Elizabeth Bobal, Plaintiff, pro se, dated October 31, 1985 in opposition to the motion, and this matter having duly come before the undersigned on December 3, 1985, and Defendants having appeared by their attorneys, Pattison, Sampson, Ginsberg & Griffin, P.C. (Miriam M. Netter, Esq., of counsel) in support of said motion, and Plaintiff having appeared pro se in opposition thereto, and both parties having had an

opportunity to be heard by this Court, and upon consideration of all prior pleadings herein, it is hereby

ORDERED that Defendants' motion to dismiss is granted with regard to the following claims: #1 Prima Facie Tort; #2 Malfeasance; #3 Abuse of Discretion; #4 Intimidation; #6 Defamation; #7 Malicious Injurious Falsehood, Disparagement; #8 Waste; #10 Conspiracy; #12 Interference with Prospective Advantage; #14 Breach of Trust; #15 Breach of Promise; #16 Abuse of Power; #17 Quasi-Contract; #18 Peonage; #19 Civil Rights Violations; #20 Anti-Trust Violations; and it is further

ORDERED that Claim Number 11 for Interference with Contractual Relations is dismissed as to Rensselaer Polytechnic Institute, the Board of Trustees, and each individual faculty member and administrator acting within the scope of their employment, but not dismissed as to those faculty

members who acted outside the scope of their employment; and it is further

ORDERED that the following claims are not dismissed: #5 Misrepresentation; #9 Conversion; and #13 Breach of Contract.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Entered: February 28, 1986

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

ORDER

Plaintiff has moved to alter and amend the court's December 20, 1985, order granting in part defendants' motion to dismiss. The court will treat this as a Rule 60 motion for reconsideration of and relief from the court's December 20, 1985 Order rather than a Rule 59 motion to alter or amend

since judgment has not been entered herein.

The court has reviewed the papers submitted in support of and in opposition to the motion, the court's bench decision of December 3, 1985, and the court's Order of December 20, 1985. Despite plaintiff's assertions to the contrary, the court did consider her reply paper of December 2, 1985, in reaching its decision on defendants' motion.

After careful consideration the court finds that plaintiff's arguments are without merit. Plaintiff's motion is denied.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Entered: April 7, 1986

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, et al.,

Defendants.

Neal P. McCurn, District Judge

ORDER

This cause came on for a hearing before this court on March 25, 1986, on plaintiff's motion to strike defendants' answer or in the alternative to strike the defendants' fourth affirmative defense.

After reviewing the papers submitted in support of and in opposition to the motion, and hearing the oral argument in support of the motion by plaintiff, pro se, and in opposition to same by Miriam M. Netter, attorney for the defendants, and due

consideration being given thereto, it is hereby

ORDERED, that the fourth affirmative defense of defendants' answer is stricken, and it is further

ORDERED, that plaintiff's motion is in all other respects denied.

SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Rendered: May 8, 1986

GAIL ELIZABETH BOBAL,

Plaintiff, pro se

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

ORDER

The judge is to issue discovery schedule, with discovery of plaintiff to be completed by August 1, 1986. Plaintiff is to make herself available for discovery on July 14 and 15, 1986 or on such other date as is mutually acceptable between plaintiff and defendants and completed before

July 31, 1986.

Discovery by plaintiff is to be completed by November 1, 1986 with a discovery schedule filed with the court by August 1, 1986.

All discovery is to be completed by November 1, 1986.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Entered: June 24, 1986

GAIL ELIZABETH BOBAL,

Plaintiff, pro se

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

ORDER

A Rule 26(f) discovery conference was scheduled by this Court for May 8, 1986, then adjourned to June 4, 1986, upon notification that plaintiff had not received notice of the May conference, and the Court having fully heard plaintiff, Gail Bobal, pro se, in opposition to : (1) the con-

ference and (2) setting a discovery schedule until a future time, and defendants, by their attorney, Miriam M. Netter, Esq., having advised the Court that the parties cannot agree on a schedule, and the Court having determined that the parties have not been able to agree to a specific mutually agreeable time schedule for discovery, and that in the interests of justice defendants have the right to this action proceeding without delay, it is hereby

ORDERED, that defendants are to depose plaintiff, and plaintiff is to submit to deposition, on July 14 and July 15, 1986, at the offices of Pattison, Sampson, Ginsberg & Griffin, P.C., (attorneys for defendants) at 22 First Street, Troy, New York, or on such other dates as shall be mutually agreeable to the parties, but said discovery is to be completed no later than August 1, 1986; and it is further

ORDERED, that plaintiff is to conduct

and complete discovery regarding the defendants, or such of them as she shall select, by October 1, 1986, and a proposed specific discovery schedule is to be filed with the Court by plaintiff on or before August 1, 1986.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Rendered: May 5, 1987

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

ORDER

I am going to observe that I have read the papers submitted by the plaintiff and I deny that motion to recuse.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Rendered: May 5, 1987

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

CONCLUSIONS OF LAW

Of course, in that letter it was pointed out to you, Ms. Bobal, that since you had taken an appeal of the Court's prior order dismissing 14 of your causes of action, which was dismissed, and then you applied for reconsideration. And at the time this motion was brought to dis-

miss the remaining causes of action your motion for reconsideration was then pending before the Court of Appeals. And therefore this Court did not have jurisdiction. Since that time the Court of Appeals has denied your motion for reconsideration, so now the Court does have jurisdiction. The record will so reflect.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Entered: May 11, 1987

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

ORDER

Defendants, having moved this Court by Notice of Motion and Affidavit of Miriam M. Netter, Esq., for an Order dismissing the remaining claims in this action pursuant to the Federal Rules of Civil Procedure 16(f), 41(b), or 37(d), and Plaintiff having submitted an Affidavit in opposition

thereto, and the motion having duly come on to be heard by this Court at a motion term held in the Federal Court House, Albany, New York, on the 5th day of May, 1987, and Defendants, by their attorney, Miriam M. Netter, Esq., having been heard in support of the motion, and Plaintiff, pro se, having appeared and argued in opposition thereto, and this Court having reviewed and duly considered all of the submissions and arguments of the parties, and the Court having rendered a bench decision granting the motion of the Defendants, it is hereby

ORDERED, that the four (4) remaining causes of action herein are dismissed with prejudice and on the merits, based on Federal Rules of Civil Procedure 16(f), 37(d), and 41(b), and in accordance with the oral decision of this Court.

IT IS SO ORDERED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Entered: June 3, 1988

GAIL ELIZABETH BOBAL,
Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, et al.
Defendants.

Neal P. McCurn, District Judge

ORDER

The United States Court of Appeals for the Second Circuit by Order dated January 13, 1988 filed with the Clerk of the Court for the Northern District of New York on February 1, 1988 remanded this matter to this court for a determination on the claim of plaintiff for disqualification of defendants' counsel herein, and this court having received the record on appeal from the Clerk of the Second Circuit Court of Appeals on May 27, 1988; and it appearing

That on May 16, 1988 plaintiff filed with the Clerk of the Court for the Northern District of New York the following:

(1) MOTION to disqualify counsel and void judgment R60(b)

(2) MOTION to vacate judgment R60(b)

(3) REQUEST to assign case to another judge

This court, after due consideration, declines the plaintiff's request to assign this matter to another judge (3) and declines to consider the motion to vacate judgment (2).

The court will hear argument at a regular motion term of this court on June 28, 1988 on that part of plaintiff's motion (1) to disqualify counsel for defendant as directed in the Second Circuit Court of Appeals remand but declines to hear argument on or give consideration to the remaining part of the motion, i.e., to void judgment herein pursuant to rule 60(b), as

not being the subject of the remand.

Defendants are to comply with the local rules in filing papers in opposition to the motion to be heard as aforesaid.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Rendered: June 28, 1988

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

FINDINGS OF FACT

You have questioned my impartiality in your papers. I am familiar with the allegations you have made; they are unfounded and untrue, and therefore, I deny your motion to recuse me.

As counsel has stated for the defendant, if a litigant merely by stating un-

true facts could cause a judge to recuse himself on every case, we would never have any finality to a case and no judge would ever be able to consider it.

I have given very careful consideration to the allegations that you make. I find they are not correct and I am not partial in this case.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Rendered: June 28, 1988

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

FINDINGS OF FACT

I am not disputing Ms. Netter's statements at all. She made an affidavit and I assume as an officer of the court she's telling the truth.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Entered: August 1, 1988

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

ORDER

The United States Court of Appeals for the Second Circuit, by order dated January 13, 1988, remanded this case for a determination on the plaintiff's claim for disqualification of defendants' counsel. After this court received the record on appeal from the Clerk of the Court of Appeals

on May 27, 1988, the court, by order dated June 2, 1988, scheduled oral argument of the disqualification issue for June 28, 1988.

On June 7, 1988, plaintiff filed a motion to disqualify this court pursuant to 28 U.S.C. Section 455(a). The court heard oral argument on this motion as well on June 28, 1988. After consideration of all the papers and arguments relevant to the motions, the court denied the motion for recusal pursuant to 28 U.S.C. section 455 (a), and reserved on the motion to disqualify counsel pending a hearing scheduled for August 23, 1987 in Albany, New York.

Plaintiff has now moved for reconsideration pursuant to local rule 10(m) of the court's ruling on recusal. After careful consideration, said request is denied.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Rendered: October 3, 1988

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants.

Neal P. McCurn, District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff was a client of LAS (Legal Aid Society) which owed her the duty of confidentiality as to anything revealed to them, whether it was through the PAI (Private Attorney Involvement) program or the LAS program or the referral to these outside lawyers.

Through the plaintiff's dealings with LAS a privilege attached which is equivalent to the status of representation of the plaintiff by LAS.

If a referral is made to the PAI attorney through LAS, any dealings with that attorney and any imputation of such to LAS have nothing to do with the issues before the court.

The issue before the court is whether Ms. Netter received the plaintiff's confidential information by reason of her position at LAS.

The court is just interested in whether or not Ms. Netter or any member of her firm obtained any knowledge surreptitiously or otherwise about this lawsuit within reason of her connection with the Legal Aid Society.

It has to be brought to the attention of the lawyer or the law firm (by plaintiff) if the client is represented or was

represented by Legal Aid; that's the crucial question here.

Disqualification of defendants' counsel on the basis of fraudulent concealment of her conflict of interest is not a pertinent aspect of the evidentiary hearing, nor is her alleged implication in a scheme involving Mr. Foster (LAS staff attorney), Ms. Weber (PAI attorney procured by Mr. Foster), and Dr. Dill (purported agent of defendants contacted by Ms. Weber).

The court is not going to make a determination on the ethics of Ms. Netter.

The matter of any unethical conduct by Ms. Netter in this case is not before the court on the disqualification claim.

Whether or not Ms. Netter gave contradictory testimony on different occasions regarding entry of a judgment does not affect her credibility.

Whether or not Ms. Netter purposely filed inapplicable legal support in her

memoranda of law does not affect her credibility.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Docket No. 85-CV-1110

Entered: January 31, 1989

GAIL ELIZABETH BOBAL,

Plaintiff,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, ET AL.,

Defendants.

Neal P. McCurn, District Judge

MEMORANDUM-DECISION AND ORDER

The United States Court of Appeals for the Second Circuit having by Order dated January 13, 1988, remanded this matter for a determination of plaintiff's claim for disqualification of defendants' counsel and this court having reviewed and considered the papers in support of and in opposition to said motion filed in the Court of Appeals prior to remand and filed in this court subsequent thereto, and the court having determined that questions of

fact were presented necessary for determination as to the conflict of interest and conduct pertaining thereto alleged by plaintiff Gail Bobal on the part of defendants' counsel Miriam Netter, the court, on October 3, 1988, held an evidentiary hearing at which the parties were offered an opportunity to present sworn testimony in support of their respective positions.

It is the contention of plaintiff herein that defendants' counsel Miriam Netter, a partner in the firm of Pattison, Sampson, Ginsberg & Griffin, P.C., Troy, New York, counsel of record for the defendants herein, had prior to and at the time of her firm's representation of defendants herein received confidential information as to plaintiff's claim or claims and improperly utilized said information to the detriment of plaintiff and plaintiff's prosecution of this action.

Plaintiff alleges that Attorney Netter

by virtue of her position as President of the Legal Aid Society of Northeastern New York and her membership on the Society's Board of Directors became privy to communications had between plaintiff Bobal and staff attorneys of said Legal Aid Society. Said communications occurred from October, 1984, through the Spring of 1985 while plaintiff was endeavoring to seek counsel from the said Legal Aid Society by direct representation of her interests or by referral to other attorneys with which said Legal Aid Society had contact in order to allow plaintiff Bobal to prosecute her claim against the defendants herein.

Attorney Netter and her law firm deny that said communications were ever relayed or imparted to them and deny any conflict of interest or improper attorney conduct.

Sworn testimony, subject to cross examination, was taken from witnesses Susan Weber, Michael Foster, Rose Dill, plain-

tiff Gail Bobal, and defendants' attorney Miriam Netter.

Michael Foster testified that he was and is a staff attorney for the Legal Aid Society of Northeastern New York, Inc., and that he first had contact with Gail Bobal in October, 1984, when she sought legal assistance from the Society in connection with her potential claim against Rensselaer Polytechnic Institute and various faculty and administrative personnel thereof. He had approximately six consultations with her, some in person and some telephonically. Upon review of documentation presented by Ms. Bobal and after discussion and consultation with other members of the Society's staff and its Executive Director, Dennison Ray, it was determined that legal representation would not be afforded by the Society to Gail Bobal in connection with her claim. A judgment was made that the case was inappropriate

for the Legal Aid Society to handle because the subject matter was not within the Society's expertise and that the case lacked merit. A letter dated November 28, 1984 (Exhibit 1) was sent to plaintiff Bobal so informing her.

Mr. Foster denied any communication whatsoever with Attorney Netter or any member of her firm in this regard. Discussion of plaintiff Bobal's case was confined to the Legal Aid attorneys and no information of any kind was imparted in relation thereto to the Board of Directors of the Society and in particular to Attorney Netter as the President thereof at that time.

Sometime thereafter and early in the year 1985 Foster received a phone call from a Professor Harvith of Albany Law School in relation to Ms. Bobal's claim, and at his behest Foster attempted informally to interest three attorney members of the Albany Bar Referral Panel in her

case, all to no avail.

Foster testified that it was a firm policy of the Society never to discuss a client or potential client's case with Board members and that said policy was strictly adhered to in this case. His first knowledge of Attorney Netter's subsequent involvement in the case was when he received notice from Attorney Netter of the motion made in the Circuit Court of Appeals for disqualification in October 1987.

Mr. Foster acknowledged that there was an attorney/client relationship between plaintiff Bobal and the Society when the consultations concerning representation were occurring in the Fall of 1984 but asserted that his contacts on her behalf with Professor Harvith and Albany Pro Bono attorneys in early 1985 were on a personal basis and not as a Legal Aid attorney.

Susan Weber, an attorney associated with the Albany law firm of McClung, Pe-

ters & Simon in March and April of 1985, testified as to her conversations with plaintiff Bobal at that time in connection with her possible representation of Bobal's interests in the matter. In that connection she contacted Rose R. Dill, a professor at Rensselaer Polytechnic Institute, in an attempt to mediate the dispute without legal action but then determined her efforts were of no avail and terminated her conferences with plaintiff Bobal without agreement to represent her. At no time did Attorney Weber contact or have any conversations or communication with Attorney Netter or members of her firm in the premises or with Mr. Foster or other Legal Aid personnel. Rose Dill was called to the stand by plaintiff and affirmed the testimony of Attorney Weber.

Attorney Netter was examined under oath by plaintiff Bobal. She had been admitted to practice in New York for over 16 years

and has been a partner in the law firm of Pattison, Sampson, Ginsberg & Griffin, P.C., since 1978. She is a member of the New York Bar Association House of Delegates and Committee on Fitness. She served on the Board of Directors of the Legal Aid Society of Northeastern New York, Inc., from 1976 - 1987 and as President of the Society from April, 1984, to April, 1986. As a member of the Board and as President of the Society, she had no contact with clients of the Society or access to information concerning their representation by the Society. In that regard she and the Board of the Society followed the mandate of the Legal Services Corporation of the United States. As President, Ms. Netter's only contact with clients of the Society was to receive appeals from clients who believed they were not properly represented by the Society. Attorney Netter testified that on only two occasions while she served

as President did Society cases come before her for consideration and those cases concerned determinations on whether to appeal court decisions adverse to the Society's clients. On no occasion did she ever consult with or have any communication with Attorney Foster, Executive Director Ray, or any other Society personnel concerning Ms. Bobal's claim or representation by the Society. Her first contact with the Bobal claim was in September, 1985, when her firm, as general counsel to defendant Rensselaer Polytechnic Institute, was called upon to answer the complaint filed by the plaintiff herein in the instant action. At no time subsequent to the filing of said complaint and up until plaintiff filed her motion to disqualify in the Second Circuit Court of Appeals did Ms. Netter or any member of firm have contact with the Legal Aid Society in relation to the matter.

Plaintiff Gail Bobal testified that

she first contacted the Legal Aid Society of Northeastern New York, Inc., in early October, 1984, and conferred with Attorney Foster at that time. All of her communications with the Society were with Attorney Foster. At his request she presented a handwritten (Exhibit 3) and a typed (Exhibit 4) resume of her claim and subsequent typewritten statements (Exhibits 5 and 6). She acknowledged that Attorney Foster told her in the Fall of 1984 that the Legal Aid staff could not handle her claim and stated that Foster informed her he would try to get outside counsel from the Society's pro se panel. Plaintiff Bobal suggested the letter turning down her case (Exhibit 2). She testified further that after her conference with Professor Harvith of Albany Law School, Attorney Foster agreed telephonically to reopen her case. She testified that Professor Harvith had volunteered to contact the Legal Aid

Society in her regard and that the Professor knew the President of the Legal Aid Society and that "he would call him up to help her." Ms. Bobal testified "he made it obvious that Presidents get involved."

Plaintiff Bobal presented no evidence to substantiate her allegations. There was no proof that either Attorney Netter or any member of her firm had received any information whatsoever from or through the Legal Aid Society as to plaintiff's claim against the defendants herein either prior to, at the time of, or subsequent to the firm's appearance on behalf of defendants and its representation of the defendants' interests herein. This was so throughout the course of the case and up until the time the issue was first raised on appeal.

This court finds that Attorney Netter in her individual capacity, in her capacity as a member of the firm of Pattison, Sampson, Ginsberg & Griffin, P.C., and in

her capacity as President and a member of the Board of Directors of the Legal Aid Society of Northeastern New York, Inc., was never presented with a conflict of interest in this matter and at all times comported with the canons of ethics and disciplinary rules in connection therewith. There was and is no basis for disqualification of Attorney Netter or the firm of Pattison, Sampson, Ginsberg & Griffin, P.C., from representation of the interests of the defendants herein.

Accordingly, the plaintiff's motion to disqualify is denied and this matter is referred back to the Second Circuit Court of Appeals for further proceedings in connection with the appeal pending therein.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 852, August Term, 1989

(Decided: May 15, 1990
On rehearing: October 22, 1990)

Docket No. 89-7413

GAIL ELIZABETH BOBAL,

Plaintiff-Appellant,

-v.-

RENSSELAER POLYTECHNIC INSTITUTE, BOARD OF TRUSTEES OF RENSSELAER POLYTECHNIC INSTITUTE, DR. GERALD MOSS, DR. PUNKAJ K. DAS, DR. DONALD S. RODBELL, DR. J. LAWRENCE KATZ, DR. HYO SUB YOON, DR. STEPHEN E. WIBERLEY, DR. EDWARD J. SMITH, DR. HENRY A. SCARTON, DR. ALLEN ZELMAN, DR. GARY JUDD, DR. WILLIAM C. JENNINGS, DR. JOHN B. BRUNSKI,

Defendants-Appellees.

Before: OAKES, Chief Judge, FEINBERG and WALKER, Circuit Judges.

Petition for rehearing of appeal from orded entered in the United States District Court for the Northern District of New York, Neal P. McCurn, Chief Judge.

dismissing pro se plaintiff's action as a sanction pursuant to Fed. R. Civ. P. 37(d).

On rehearing, petition granted and judgment affirmed.

GAIL ELIZABETH BOBAL, Edison, New Jersey, Plaintiff-Appellant, pro se.

MIRIAM M. NETTER, Troy, New York (Pattison, Sampson, Ginsberg & Griffin, P.C., Troy, New York, of counsel), for Defendants-Appellees.

PER CURIAM:

On May 15, 1990, we affirmed in part and reversed in part orders entered by the District Court for the Northern District of New York (Neal P. McCurn, C. J.). Familiarity with our earlier opinion is presumed. Bobal v. Rensselaer Polytechnic Institute, et al., No. 89-7413 (2d Cir. May 15, 1990). Our reversal of Judge McCurn's ultimate dismissal of this action as a sanction revolved around a conference held on June 4, 1986. At that conference, the district judge attempted to

fashion a discovery schedule. He ordered Bobal to appear for her scheduled deposition. In response, she stated that she would not appear and then left the courtroom. Bobal candidly admitted that she violated the court order, but attempted to justify her conduct because she "conclude[d] that the order would irreparably prejudice her case."

We reviewed the dismissal pursuant to Fed. R. Civ. P. 37(d), which addresses a party's failure to appear for her deposition. The imposition of sanctions under that rule "is within the discretion of the district court and a decision to dismiss an action for failure to comply with discovery orders will only be reversed if the decision constitutes an abuse of that discretion." John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., 845 F.2d 1172, 1176 (2d Cir. 1988). From a review of the appendices filed by both parties, it ap-

peared that Judge McCurn had not warned Bobal that a violation of his order would result in the harsh sanction of dismissal. Cf. Schenk v. Bear, Stearns & Co., 583 F.2d 58, 59 (2d Cir. 1978) (reversing district court's dismissal for failure to prosecute, noting that "there had been no ... judicial participation indicating that a dismissal might be in the offing.") At the argument of this appeal and in response to a question from the court, counsel for appellees stated that Judge McCurn had not warned this pro se plaintiff that a dismissal might result from a violation of his order. Although appellant made use of her opportunity for rebuttal, she did not dispute appellees' response.

Subsequent to the issuance of our original opinion, appellant forthrightly notified this court that she had, in fact, been warned by Judge McCurn at the conference on June 4, 1986. At that conference,

Judge McCurn told plaintiff that "[i]f you are not available, Bobal, for deposition as I direct you I will entertain a motion to dismiss your case ..." Based upon that concession, appellees moved to file an untimely petition for rehearing. Pursuant to Fed. R. App. P. 40, which provides that "a petition for rehearing will ordinarily not be granted in the absence of "a request from the court for an answer to the petition, we requested appellant to respond.

Our original opinion required that a warning be given to this pro se litigant before her case could be dismissed as a sanction for noncompliance with a discovery order, and we specifically relied on the district court's apparent failure to warn Bobal. In fact, as it now turns out, such warning was given and we think the warning was adequate to inform her of the consequences of noncompliance. While it

is true that the district court did not expressly state that the dismissal would be with prejudice, a pro se litigant would reasonably assume that to be the case and, particularly so, in the context in which the warning was given--one in which a dismissal without prejudice would have been virtually meaningless. We note also that Bobal has never voiced any belief that the dismissal warning meant anything other than dismissal with prejudice.

Therefore, we now grant appellees' petition for rehearing and amend our prior judgment. The district court's dismissal of Bobal's action as a sanction for her willful violation of the district court's discovery order is affirmed. We also acknowledge Bobal's candor and her willingness to bring all relevant facts to the court's attention.

Pursuant to Fed. R. App. P. 39(a), costs to appellees.

22 First Street,
P.O. Box 208
Troy, NY 12181-0208
May 9, 1986

Ms. Gail E. Bobal
160 Stony Road
Edison, NJ 08817

Re: Bobal v. RPI

Dear Ms. Bobal:

Enclosed please find defendants' presentation relative to the 26(f) conference held by Judge McCurn on May 8, 1986, in Albany in accordance with his direction.

Judge McCurn stated that he will set a discovery schedule. ....

Sincerely,

Pattison, Sampson, Ginsberg & Griffin, P.C.

Miriam M. Netter

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 85-CV-1110
GAIL BOBAL	RENSSELAER POLYTECHNIC INSTITUTE, et al.	PAGE 2

DATE	NR.	PROCEEDINGS
1986		
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Apr 30	27	Filed Civil Appeal Sched-Order #1
May 9	28	Filed Defts.' Facts
May 8	29	Filed Transcript of the motion proceedings held in the above-entitled matter on the 25th day of March
May 8		Pre-Trial Conf. - 1/2 hr.; Conf. proceeds without Pltf. Pro Se's presence

after waiting 20 min. for her to appear; Judge McCurn will issue a discovery schedule order as follows: Deposition of Pltf. to be conducted on 7/14 & 7/15 or on such other dates as are acceptable to both parties but to be completed no later than 8/1/86; Discovery by Pltf. is to be completed by 11/1/86 w/ Pltf. to file a proposed discovery schedule w/ Court by 8/1/86; All discovery is to be completed by 11/1/86.